

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018120757

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on January 30, 2019.

Keri Neal, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's foster mother represented claimant, who was not present. Claimant's foster mother was assisted by a certified Spanish language interpreter.

The matter was submitted on January 30, 2019.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of Intellectual Disability, Autism Spectrum Disorder (autism), cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability (fifth category)?

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On October 24, 2018, IRC notified claimant's foster mother that claimant, a five-year-old boy, was not eligible for regional center services based on a diagnosis of intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability (fifth category).

2. On November 29, 2018, claimant's social worker filed a Fair Hearing Request, which stated:

The Department would like minor to be re-assessed for developmental behavioral problems. Claimant requires re-directing because he is easily distracted and forgets instructions, due to hyperactive behavior.

3. On January 2, 2019, claimant's foster mother, claimant's social worker, and representatives from IRC attended a telephonic informal meeting to discuss the Fair Hearing Request. IRC memorialized the meeting in a letter, which stated, in part:

[Y]ou presented your concerns regarding claimant and why you believe he is eligible for services. You explained that something is going on with claimant because of his behavioral challenges. Claimant has difficulty following directions, he will not sit still for more than 5 minutes, he has poor boundaries with other children, he is easily distracted and is very hyperactive. You also explained that claimant has tantrums in which he will yell and jump up and down daily, 3

to 4 times per week. For example, if he is watching T.V. and the T.V. is turned off he will throw himself on the floor and start yelling.

[¶] ... [¶]

Claimant's social worker explained that claimant visits a therapist weekly to assist him with improving his anger and hyperactive behaviors. Claimant's social worker further explained that claimant has been diagnosed with Attention Deficit Hyperactivity Disorder, Anxiety Disorder, and Autism Spectrum Disorder by his therapist. ...

#### DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

4. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) contains the diagnostic criteria used for intellectual disability. Three diagnostic criteria must be met: Deficits in intellectual functions, deficits in adaptive functioning, and the onset of these deficits during the developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

#### DIAGNOSTIC CRITERIA FOR THE FIFTH CATEGORY

5. Under the fifth category, the Lanterman Act provides assistance to individuals with disabling condition closely related to an intellectual disability that requires similar treatment needs as an individual with an intellectual disability but does not include other handicapping conditions that are "solely physical in nature." A disability involving the fifth category must also have originated before an individual

attained 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

#### DIAGNOSTIC CRITERIA FOR AUTISM

6. The DSM-5 also identifies criteria for the diagnosis of autism. The diagnostic criteria includes persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a DSM-5 diagnosis of autism to qualify for regional center services under the eligibility criterion of autism.

#### EVIDENCE PRESENTED AT HEARING

7. Dr. Greenwald has been a licensed psychologist since 1987. He is licensed in California and Florida. He has been a staff psychologist at IRC since 2008. Dr. Greenwald has extensive experience in conducting psychological assessments of children and adults suspected of having developmental disabilities that may qualify them for regional center services. He also supervises psychological assistants who conduct similar assessments. Dr. Greenwald is an expert in the field of psychology, as it relates to the diagnosis of autism and intellectual disability under the DSM-5 and the Lanterman Act.

The records submitted by claimant, which Dr. Greenwald reviewed, included: Claimant's October 18, 2018, Individualized Education Program Meeting Notice and Individualized Education Plan (IEP); an August 30, 2018, Multidisciplinary Assessment

Report; a SART<sup>1</sup> progress report dated January 7, 2019; and a psychological assessment dated October 4, 2018. Below is a summary of Dr. Greenwald's testimony and the documents.

Claimant currently receives special education services through his school district. Claimant is served under the category of Specific Learning Disability. Claimant has never been served under a diagnosis of autism or intellectual disability. Claimant's IEP does not contain any facts which would indicate a diagnosis of autism, intellectual disability, or any other qualifying condition for regional center services. Claimant is able to communicate needs and wants. For social and emotional skills, he is functioning at age level and there were no concerns noted. Claimant has no daily living skill problems and they appear to be age appropriate. Thus, claimant's social and emotional skills and communication skills as documented in the IEP are not typical of a child who would have a diagnosis of autism, or any other qualifying condition, under the DSM-5.

Similarly, the Multidisciplinary Assessment Report contained no information showing claimant is eligible for regional center services. The report consists of two pages and includes the following diagnoses: Attention Deficit Hyperactivity Disorder (ADHD), autism, and Unspecified Anxiety Disorder. The report, however, does not contain any supporting testing that was conducted to reach those conclusions. The report also does not indicate where those diagnoses were obtained (by history, by documents, by interview, etc.)

The SART progress note similarly did not contain any information regarding autism or any other qualifying diagnosis. The SART progress note is one page and

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<sup>1</sup> SART is a program run by the County of San Bernardino that involves a comprehensive continuum of screening, assessment, referral, treatment to address the needs of children with behavioral problems.

consists of checked boxes and a few typed lines regarding “comments and concerns.” It contains a therapist name and social worker name, but does not indicate if any clinical psychologist took part in preparing the document. The SART progress note lists claimant’s “current diagnosis” as Persistent Depressive Disorder, which Dr. Greenwald explained is psychiatric, as opposed to developmental, in nature. The Lanterman Act specifically excludes psychiatric disorders.

The psychological assessment dated October 4, 2018, was the most comprehensive document provided. This assessment utilized the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WISC-4). The WISC-4 results showed claimant’s full scale IQ was 98, which is average intelligence. The WISC-4 also had five subtests that measured different factors or aspects of claimant’s intelligence, which ranged from low average to superior range. Such scores are not typical of a person with autism or intellectual disability. Indeed, claimant’s cognitive skills far exceeded what would be considered an intellectual disability.

Additionally, the Autism Diagnostic Observation Scale – Second Edition (ADOS-2) was also administered, which is the gold standard for assessing whether a person has autism. Claimant did not score within the autism range. The Childhood Autism Rating Scale - Second Edition (CARS-2), is a screening tool used to assess whether a person may have autism. The CARS-2 placed claimant at a score of 18.5, which falls within the minimal to no autism symptom range. The Adaptive Behavior Assessment System – Third Edition (ABAS-3) is a test that assesses a person’s adaptive skills, utilizing a rating system. Claimant’s ABAS-3 scores showed no adaptive deficits either for the general adaptive composite or the three components that make up the test (conceptual, social, and practical). The report contained the following diagnostic impressions: Conduct Disorder, Attention Deficit Hyperactivity Disorder (ADHD) (by records), autism (by records), and unspecified anxiety disorder (by records). Dr. Greenwald explained that it is

important to note that while the doctor did list the autism disorder under diagnostic impressions, that the diagnostic impression noted that it was by record review only, because the testing completed showed claimant did not meet the DSM-5 criteria for autism.

According to the psychological assessment, claimant is a dependent of the court, parental rights having been terminated. Claimant has an extensive history of trauma, and was removed from his mother because of both neglect and physical abuse. Claimant has been with his current foster mother since April 20, 2016. Claimant's foster mother has reported severe behavioral problems, including stealing things, biting, hitting, throwing objects at other people, and getting in trouble at school. Based on a history of abuse and neglect in infancy, and potentially having been a witness to violence before being placed in foster care, Dr. Greenwald explained that there is a possibility that claimant may have anxiety and/or stress related disorders, including reactive attachment disorder (RAD) and post-traumatic stress disorder (PTSD). The documentation provided by claimant's social worker and foster mother also indicate that claimant may suffer from ADHD. However, the documents did not show claimant is substantially disabled as a result of a DSM-5 diagnosis of intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability.

8. Claimant's foster mother did not provide any direct testimony concerning claimant, except to say that he has been with her for two years. She asked several questions of Dr. Greenwald, and also had Dr. Greenwald go through and explain to her the DSM-5 criteria for ADHD. As he did so, claimant's foster mother agreed that claimant exhibited all the symptoms of ADHD.

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## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

### STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4501 provides:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance ...

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services



and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

3. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that "originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual." A developmental disability includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act. (*Ibid.*)

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4. California Code of Regulations, title 17, section 54000, provides:

(a) "Developmental Disability" means a disability that is attributable to mental retardation<sup>2</sup>, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

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<sup>2</sup> Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a

need for treatment similar to that required for mental retardation.”

5. California Code of Regulations, title 17, section 54001, provides:

(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

## EVALUATION

6. The burden was on claimant to establish his eligibility for regional center services. Claimant did not meet his burden. The ADOS, which is the gold standard of autism testing, showed claimant did not have autism. The CARS-2 screening showed claimant scored outside the range for autism. Claimant is not served under special education for autism or intellectual disability. Claimant does not appear to have any adaptive deficits, and there is no evidence of repetitive or restricted patterns of behavior. Claimant clearly has some behavioral problems, but those problems are also

consistent with other diagnoses such as ADHD, RAD, Unspecified Anxiety Disorder, PDD, or any combination thereof. However, none of those conditions qualify a person for regional center services. In sum, the evidence did not show that claimant qualifies for regional center services under a diagnosis of Intellectual Disability, autism, cerebral palsy, epilepsy, or the fifth category.

## ORDER

Claimant's appeal from the Inland Regional Center's determination that he is not eligible for regional center services and supports is denied.

DATED: February 6, 2019

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KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings

## NOTICE

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.**